

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

YUSUF ABDUR-RAHEEM MUSAFIR,

Defendant-Appellant.

UNPUBLISHED

October 31, 2006

No. 262940

Wayne Circuit Court

LC No. 04-012730-01

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of attempted larceny from a person, MCL 750.92 and 750.357, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of 23 to 60 months' imprisonment for the attempted larceny and felon in possession convictions, plus two years' consecutive imprisonment for the felony-firearm conviction. Defendant moved for resentencing on the grounds that Offense Variables 1 and 13 were misscored and that he should have received sentence credit, but the trial court denied his motion. We remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial, the victim testified that defendant approached him outside a restaurant in Hamtramck and asked him if he wanted to buy some glasses. The victim declined and entered the restaurant. Defendant again approached the victim about buying glasses and then grabbed the victim around the neck from behind and said "come off with the coat." As the victim was trying to get out of the chokehold, the two fell to the floor and wrestled. At that point, defendant pulled a gun on the victim and pointed it at his chest. Defendant did not speak to the victim as he was pointing the gun at him. The victim testified that as he was attempting to remove his coat, the police arrived and both he and defendant were arrested. At trial, the victim identified [] the gun that defendant pointed at him.

An officer of the Hamtramck Police Department testified that he was dispatched to a fight in the restaurant. When he arrived, two officers were present and both defendant and the victim were on the floor. He saw a gun in the front left pocket of defendant's pants. The hammer was cocked and there were six live rounds in the gun.

At the original sentencing hearing, the defense made no objections to the scoring of the sentencing guidelines or to the information in the presentence investigation report. The court sentenced defendant to the terms noted above, and also made them consecutive to another sentence for which defendant was on parole when he committed these offenses.

Defendant's appellate counsel moved for resentencing. The trial court resubmitted the case to the Department of Corrections for a review of the guidelines and a determination whether defendant was entitled to sentence credit for the time he spent in jail awaiting the original sentencing. At a hearing on March 24, 2006, the court denied defendant's motion for resentencing.

On appeal, defendant argues the same issues that were raised in his motion for resentencing.

OV 1 addresses the aggravated use of a weapon during the commission of the charged offense. Defendant argues that the trial court erred in scoring 5 points for this variable. Five points should be scored if a "weapon was displayed or implied." MCL 777.31(1)(e). Fifteen points is scored if a "firearm was pointed at or toward a victim." MCL 777.31(1)(C). Here, the victim testified that defendant pointed a gun at him during the incident. Furthermore, the officer who responded to the scene found a loaded gun in defendant's pants pocket. Clearly, the trial court properly scored five points for OV 1.

Defendant further argues that OV 13 was improperly scored at 25 points. OV 13 addresses a continuing pattern of criminal behavior. Twenty-five points are appropriate if the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. MCL 777.43(1)(b).

Attempted larceny from a person is a crime against a person as defined by statute. MCL 777.16r. However, the other two crimes of which defendant was convicted—felon in possession of a firearm and felony-firearm—do not fall within that category. Rather, the crime of felon in possession of a firearm is a public safety crime. MCL 777.16m. Possession of a firearm during a commission of a felony is not a crime that is covered by the guidelines, and more akin to the other firearm charge than the larceny charge. The proper score is zero under MCL 777.43(1)(g) because no pattern of criminal activity existed. As the prosecutor concedes, the trial court erred in scoring OV 13 and resentencing is therefore required. See *People v Francisco*, 474 Mich 82, 86-88; 711 NW2d 44 (2006).

Defendant further asserts that the trial court erred when it failed to grant credit against his sentence for time spent in jail awaiting sentencing. We disagree. Defendant raised this issue for the first time in his motion for resentencing, but he states a de novo standard of review applies. However, this Court has held that a defendant must object to the failure to give sentence credit at the sentencing, and the failure to do so fails to preserve the issue for appeal. Unpreserved sentencing errors are reviewed for plain error affecting substantial rights.

When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense. A parole detainee who is convicted of a new criminal offense is entitled to credit for time served in jail as a parole detainee, but that credit may only be applied to

the sentence for which the parole was granted. MCL 768.7a(2), MCL 791.238(2); *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006); *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). In light of these authorities, defendant is not entitled to credit against the instant sentences for jail time served prior to sentencing.

Defendant relies upon dicta from an unpublished opinion, *People v Vasser*, unpublished opinion per curiam of the Court of Appeals, decided April 1, 2003 (Docket No. 231246), to support his argument. However, an unpublished opinion is not binding under the doctrine of stare decisis. MCR 7.215(C)(1); *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Remanded for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette